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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-15

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,
a Political Subdivision of the State of California,
PEOPLE OF THE STATE OF CALIFORNIA,
LEAGUE TO SAVE LAKE TAHOE, and SIERRA CLUB,
Petitioners,

vs.

TED JENNINGS, OLIVER KAHLE,
HARVEY'S WAGON WHEEL, INC., and COUNTY OF DOUGLAS,
a Political Subdivision of the State of Nevada,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., and County of Douglas, jointly file this Brief in Opposition to the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the Nevada Statute of Limitations is applicable to the administrative decisions of Douglas County, a political subdivision of the State of Nevada.

2. If this action is not barred by the Nevada Statute of Limitations, is there any legal requirement that Douglas County makes formal and specific written findings in issuing an Administrative Permit, and if so, whether the findings made by Douglas County were sufficient?

3. Whether Petitioners have sufficiently stated a claim for interstate nuisance which is anticipatory and allegedly results indirectly from Respondents' respective projects.

STATUTES INVOLVED

There are no Federal statutes involved in the within action. This case involves an interpretation of the Land Use Ordinance of the Tahoe Regional Planning Agency which is set forth in Appendix E of the Petition.

Nevada Revised Statute 278.027 is also involved and is set forth in Appendix G to the Petition.

STATEMENT OF THE CASE

The within consolidated actions are the sixth and seventh suits instituted by some or all of the Petitioners against some or all of the Respondents attacking the permits for the respective projects of Respondents as approved by Douglas County and the Tahoe Regional Planning Agency.

Each of the Respondents was issued an Administrative Permit by Douglas County for the construction of hotel and casino facilities in 1973. Each of these Permits was subsequently deemed approved as a matter of law in accordance with the Tahoe Regional Planning Compact (Appendix D). In the present case, Petitioners seek judi-

cial review of the administrative action of Douglas County more than four years after that action was taken. The substance of Petitioners' claim is that Tahoe Regional Planning Agency's Land Use Ordinance prohibits any height in excess of forty feet and that there was insufficient evidence to support the approvals and findings made by Douglas County in issuing the Administrative Permits and authorizing a height in excess of forty feet for Respondent's projects. Petitioners also claim that Respondents' projects, by attracting vehicles to the Tahoe Basin, will at some point in time constitute a Federal common law nuisance.[1] Neither the TRPA nor the State of Nevada was made a party to this action.

In the District Court, Petitioners' Complaint was dismissed pursuant to Motions to Dismiss and for Summary Judgment filed by Respondents. These motions were granted after the District Court held a hearing on Respondents' motions, as well as Petitioners' Motion for Summary Judgment and for Preliminary Injunction. The District Court dismissed Petitioners' claims on a multitude of grounds. In affirming, the Ninth Circuit addressed only the issue of the applicability of Nevada Revised Statute 278.027 and the common law nuisance claim.

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[1]Petitioners have now apparently abandoned their claim that the Land Use Ordinance prohibits as a matter of law all height in excess of forty feet. However, it was solely this interpretation of the Land Use Ordinance upon which the Ninth Circuit and the District Court found Federal jurisdiction based on the case of *League to Save Lake Tahoe v. BJK Corp.* 547 F.2d 1072 (9th Cir. 1976). The District Court and the Ninth Circuit addressed the other issues based only on pendent jurisdiction. (See Ninth Circuit Opinion, Page 11, Petitioners' Appendix and Footnote 5, Page 27) Thus with the possible exception of the nuisance claim, Appellants have abandoned the only claim upon which Federal jurisdiction was based.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Petitioners' basis for seeking a Writ of Certiorari in the present case is that the Ninth Circuit has decided an important question of Federal law which has not, but should be, settled by the United States Supreme Court, and that the Ninth Circuit Opinion on the nuisance claim is in conflict with a decision by the Seventh Circuit in the case of *Illinois v. City of Milwaukee*. Neither of these reasons has merit.

I

THIS CASE DOES NOT PRESENT CRITICAL ISSUES CONCERNING OBLIGATIONS BETWEEN STATES UNDER EITHER AN INTERSTATE COMPACT OR FEDERAL COMMON LAW.

Petitioners state that with numerous interstate compact agencies making decisions affecting millions of Americans, all actions of local agencies acting under a compact should follow the same administrative law procedures. They argue:

> 1. "Otherwise findings may be required in one state but not in another to sustain decisions under a common regulation." (Petitioners' Brief at p. 13)
>
> 2. "The decision also ignores the fact that essence of a compact intended to protect natural resources is to insure that 'vigilance of one state is not thwarted by inaction, or lax administration in an adjoining state." (Petitioners' Brief at p. 13)

In response thereto, Respondents contend that Petitioners' purported perception of critical issues is a poorly

camouflaged effort to persuade this Court to rewrite the compact.

California entered into the compact to help coordinate and control growth and development in the Lake Tahoe Basin. As an equal party in the interstate agency (TRPA) under the compact, California participated in the adoption of a regional plan and ordinances to regulate new construction in the Basin.

Pursuant to the compact, the TRPA delegated initial permit granting functions to local authorities. This action was consistent with the jealous retention of sovereignty by the two parties to the compact.

The Court of Appeals stated,

> "Although the Ordinance does not specify the procedures to be used by local permit-issuing authorities, § 3.00 does define an 'Administrative Permit' as 'A permit issued by a permit-issuing authority *in accordance with its procedures.*'" (Italics added). "The Ordinance thus clearly intended local administrative procedures to apply to the initial issuance." (App. A, at p. 14)

By consenting to the compact, Congress did no more than incorporate the agreement of the two states into the body of Federal law. It did not make applicable to the agreement the entire armament of Federal administrative and substantive standards.

The Court of Appeals continued:

> "It cannot be gainsaid that the understanding of Congress about the meaning of the Compact is important; but the actual agreement of the States is

> certainly no less so. We believe that the proper balance between the respective sovereigns requires that the intention of the two States, acting through TRPA, govern the meaning of the L.U.O. to the extent that intention is not in conflict with the Compact itself." (App. A at p. 16)

The Court then determined that the TRPA delegated the power to local permit-issuing authorities to issue administrative permits in accordance with normal procedures. It concluded that the TRPA did *not* seek to establish one uniform procedural process but rather it sought to establish standards to be applied by state entities according to *their* traditional land use determination procedures, retaining discretionary power to overturn or modify the decision if it so chose.

While there might be much to commend a Uniform Administrative Procedures Act expressly made applicable to all interstate compacts by the participants, such is not the case here. As the Court properly noted in *People ex rel. Younger v. TRPA,* 516 F.2d 215, 220 (9th Cir. 1975),

> "(The Compact is the result) of deliberate action by the legislatures of Nevada and California and the Congress of the United States. This court is not empowered to rewrite the Compact. California's remedy lies solely with the legislative branches of the parties to the Compact."[2]

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[2]It is worth noting that California's interest in the interstate compact is apparently waning. A story in the Reno Evening Gazette under date of July 16, 1979, stated;

> "Friday, California Governor Edmund Brown, Jr., vetoed his state's share of the bi-state agency's funding before signing the state's budget. Brown eliminated $75,000.00 for TRPA which California Resources agency director Huey Johnson acknowledged 'buried' the bi-state compact."

The laws applicable to and the procedures to be followed by any bi-state agency must be determined solely by reference to the Charter Document of the particular agency. In the present case, the Charter Document is the TRPA Compact. The TRPA Compact is truly unique. The Ninth Circuit ruling that Nevada law was applicable to the action of Douglas County, a political subdivision of the State of Nevada, is predicated upon the language of the TRPA Compact and of the ordinances adopted pursuant to that Compact. This holding by no means establishes that local state law should be applied in every instance under every bi-state agreement or compact.

Next, Petitioners contend that the Court of Appeals decision poses a critical issue involving common law. Petitioners state that the decision of the Ninth Circuit is in conflict with the 7th Circuit's recent decision in *Illinois v. City of Milwaukee,* ..... F.2d ..... (Number 77-2246, April 26, 1979) (App. H). However, the *City of Milwaukee* case is clearly distinguishable from the present case. A complete discussion of the *City of Milwaukee* case is set forth in Section IV of this brief.

II

THE SUFFICIENCY OF THE FINDINGS OF DOUGLAS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, IS NOT A FEDERAL CONCERN, MUCH LESS A QUESTION OF FEDERAL LAW OF SUCH IMPORTANCE THAT SUPREME COURT REVIEW IS REQUIRED.

Because the Ninth Circuit held that the within action was barred by the applicable Nevada Statute of Limitations,

the Ninth Circuit never reached the question of whether findings are required or whether the findings that were made are sufficient under the Land Use Ordinance of the TRPA.

It is beyond dispute that the drafters of the TRPA Compact reserved substantial power and authority in the respective states and in the political subdivisions of the states. This overriding intent is best demonstrated by the dual majority provision in the Compact (Article III(g)), the sixty-day rule (Article VI(k)), and the Land Use Ordinance (Petitioners' Appendix E)[3].

The authority that the TRPA does have is only exercised when the governing body of the TRPA reaches a dual majority vote. *Younger v. TRPA*, 516 F.2d 215 (9th Cir. 1975) cert. denied 423 U.S. 868. Zoning and permit matters are left to the local political subdivisions. To the extent that there may be differences in the procedures and the laws applicable to the various political subdivisions surrounding Lake Tahoe, those differences were intended to be continued by the drafters of not only the Compact but also the TRPA Land Use Ordinance. It is an important fact that the within case is seeking judicial review of the administrative decision of Douglas County and not of any action or even the failure to take action by the TRPA itself.

[3]There are other indications of reservation of powers in the Compact, including the so-called "Gaming Grandfather Clause" set forth in Article VI (a) which requires that all TRPA ordinances and policies recognize gaming as a permitted and conforming use on any property that was zoned for gaming prior to the existence of the TRPA.

When the Compact and the TRPA Land Use Ordinance expressly reserve substantial authority for local governments, it necessarily follows that those local entities acting within their authority are subject to state law, and not a comprehensive system of Federal common law.

In the present case, Douglas County followed all applicable procedures in issuing the Administrative Permits to Respondents, which included a public hearing with timely advance notice of such hearing, together with an opportunity for all interested parties to be heard. None of the Petitioners herein claiming that Douglas County acted in an arbitrary manner even bothered to appear at the public hearings before the Douglas County Commissioners and to state their objections to the Administrative Permits of the Respondents.[4]

Each of the Respondent hotels submitted voluminous information and materials to Douglas County and made presentations at the public hearings. The administrative record as presented to the District Court is voluminous. Douglas County acted upon the applications of the respective hotels for their permits on April 24, 1973 (Oliver Kahle), on May 5, 1973 (Ted Jennings), and on June 20, 1973 (Harvey's Wagon Wheel, Inc.). The District Court held the record of each of the Respondents was sufficient to support the issuance by Douglas County of the permits

[4]Petitioners' failure to appear, much less meaningfully participate in the hearings before Douglas County, is sufficient in and of itself to preclude the within action, and the District Court so held. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *United States v. L. A. Tucker Trucklines*, 344 U.S. 33 (1952); *Marshall Field & Co. v. NLRB*, 318 U.S. 253 (1953). It was not necessary for the Ninth Circuit to reach this issue.

in question. Douglas County's action did not violate any rule, regulation, or ordinance of the TRPA, the TRPA Compact, or any Federal law.

There is no requirement under the TRPA Land Use Ordinance or in the Compact that the permit issuing authority make specific written findings in issuing an Administrative Permit, including one that authorizes a height in excess of forty feet. Neither Section 7.13 nor 8.33 of the Land Use Ordinance requires formal written findings. Under Federal law, unless specifically required by statute, formal findings are not necessary. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

There is no authority, either statutory or judicial, in the State of Nevada that would require Douglas County to make written findings or specific subfindings. In Nevada, the Courts look not to a statement of findings, but rather to the evidence contained in the record of the hearing. In Nevada, the Court follows the "implied findings" doctrine, which provides that in the absence of any express findings, the Court will imply findings in favor of the decision reached if the evidence supports the implication. *Dutertre v. Shallemberger*, 34 P. 449 (Nevada 1893); *Buchanan v. Buchanan*, 523 P.2d 1 (Nevada 1974).

Under Nevada law, judicial review of an administrative decision is confined to the evidence presented at the hearing to determine if the decision was supported by substantial evidence. The reviewing court does not weigh the evidence presented, but examines it to determine if it contains substantial evidence in support of the decision so that a conclusion may be drawn that the administrative

body did not act arbitrarily and capriciously. *State ex rel. Sweikert v. Briare*, 588 P.2d 54 (Nevada 1978); *Turk v. Nevada State Prison*, 575 P.2d 599 (Nevada 1978).

The Compact and the TRPA ordinances have delegated the permit granting function to local authorities who are governed by their normal, and traditional land use determination procedures. Included in this reservation or delegation, as the case may be, must be the process by which such action may be challenged as established by the statutes and courts of the state in which the local authority is located. Insofar as the procedures utilized do not misinterpret the Compact or the TRPA ordinances or fail to provide adequate review to assure compliance with local procedures, the action of Douglas County is a matter of state law.

III

THIS ACTION IS BARRED BY THE NEVADA STATUTE OF LIMITATIONS.

Petitioners claim that the Ninth Circuit Court of Appeals erred in holding that Nevada Revised Statute 278.027 (Appendix G) bars the within action. In essence, 278.027 requires that judicial review of the decision of the governing body of a county to grant any special use or variance permit must be commenced within twenty-five (25) days. When this case is put in its proper perspective, it becomes abundantly clear that the Ninth Circuit did not err in holding that NRS 278.027 barred the within action.

The substance of Petitioner's claim is that the Board of Commissioners of Douglas County, a political subdivision

of the State of Nevada, acted arbitrarily in issuing Administrative Permits (special use permits) to Respondents on the grounds that Respondents' projects exceeded 40 feet in height and that there was insufficient evidence to support the determinations and findings made by Douglas County in authorizing a height in excess of 40 feet and in issuing the Administrative Permits. Petitioners commenced this action seeking judicial review of the administrative decisions of Douglas County more than four years after those decisions were made and the Permits were issued. In addition, the Petitioners did not even appear before Douglas County to voice their opposition to the Administrative Permits.

The language of the Compact, as well as its legislative history and the judicial interpretations thereof all indicate that the TRPA Compact intended to and did reserve substantial authority to the individual states and the local governmental entities within each state. The TRPA is not an omnipotent zoning board whose approval is a prerequisite to all development and who can enforce its will over the majority vote of one state's delegation. The authority to issue permits remains in the hands of the local zoning authorities, which, in the present case, was Douglas County. The TRPA only has a limited review function. *People of the State of California ex rel. Evelle J. Younger v. TRPA, et al.*, 516 F.2d 215 (9th Cir. 1975) Cert. denied 423 U.S. 868 (1975). This is not an action to review any action taken by the TRPA; and despite Petitioners' protestations to the contrary, this is not an action to determine the nature and scope of obligations between two states. Indeed, the State of Nevada is not even a party to

the within action. Neither does the question of substantial evidence to support the determination of Douglas County or whether findings are required involving an interpretation of any TRPA ordinance. Petitioners are thus seeking judicial review of an administrative decision of a political subdivision of the State of Nevada, yet contend that the Nevada laws are not applicable to that political subdivision.[5]

Petitioners claim that the Ninth Circuit misinterpreted NRS 278.027, even though the Ninth Circuit interpretation followed the interpretation of the Nevada Supreme Court in the decision of the *League to Save Lake Tahoe v. TRPA*, 563 P.2d 582 (Nevada 1977) a case brought in State Court by the Petitioner, League to Save Lake Tahoe, which is virtually identical to the within case. The judicial construction of NRS 278.027 by the Nevada Supreme Court is a part of the statute. *Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941). The decisions of the Nevada Supreme Court and the Ninth Circuit recognize that a county is a creature of statute with limited jurisdiction. A county cannot act except pursuant to express legislative authority. The only statutory authority in the State of Nevada enabling a county to act with respect to zoning or land use matters is set forth in Nevada Revised Statutes 278.010 through 278.630. Thus the action taken by Douglas County

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[5]There is a substantial question of Federal jurisdiction in this case since it does not involve an interpretation of any Federal law or the TRPA Ordinance which would substantially effect the effective functioning of the TRPA Compact. *League to Save Lake Tahoe v. BJK Corp.*, 547 F.2d 1072 (9th Cir. 1976). The U. S. District Court "does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Chicago R. I. & P. & R. Co. v. Stude*, 436 U.S. 574 (1964).

in issuing the Administrative Permits to the Respondents in the within case was necessarily pursuant to that legislative grant of authority. NRS 278.027 is expressly applicable to action taken by a county pursuant to NRS 278.010 to 278.630.

The holding of the Ninth Circuit and the Nevada Supreme Court is further supported by Nevada Revised Statute 278.025[6] which provides in part as follows:

> "The powers conferred by NRS 278.010 to 278.630, inclusive, shall be exercised whenever appropriate in furtherance of a plan adopted by the regional planning agency."

NRS 278.025 was enacted in 1968 as Section 1 of a bill which included the Compact and became effective at the same time as the Compact. 1968 Statutes of Nevada 14. Thus, the Legislature contemplated that counties in Nevada would be acting pursuant to the authority of NRS 278.010 to 278.630 in furtherance of the TRPA Compact and ordinances. Douglas County so acted in the present case. When a state political subdivision takes action in an area traditionally and expressly reserved for local governmental entities such as the issuance of a special use permit, merely because that action may be reviewable by a bi-state agency

[6]"278.025 Powers of regional planning agency created by interstate compact.

1. In any region of this state for which there has been created by interstate compact a regional planning agency, the powers conferred by NRS 278.010 to 278.630, inclusive, are subordinate to the powers of such regional planning agency, and may be exercised only to the extent that their exercise does not conflict with an ordinance or plan adopted by such regional planning agency. The powers conferred by NRS 278.010 to 278.630, inclusive, shall be exercised whenever appropriate in furtherance of a plan adopted by the regional planning agency."

should not preclude the application of a state statute of limitation, especially when the bi-state agency takes no action on the matter.

Petitioners' assertion that no notice of final action has been filed was also rejected by the Nevada Supreme Court in *League to Save Lake Tahoe v. TRPA, supra.*

There is sound policy behind a relatively short time period in which to seek judicial review of administrative decisions. An administrative action is entitled to the same degree of certainty and finality as judicial proceedings. NRS 278.027 recognizes and establishes that policy within the State of Nevada. An applicant should be entitled to rely on administrative action after a reasonable period of time. Four years is well beyond any reasonable period of time.

Petitioners cannot be heard to complain that the 25-day time limitation in NRS 278.027 is too short or that Petitioners have not had an opportunity to litigate Respondents' permits. As was pointed out by the Ninth Circuit, the 25 days is expanded by at least 60 days, thus giving 85 days from the action of the county in which to seek judicial review. In addition, each Petitioner commenced an action attacking the Administrative Permits of Respondents within the 25-day time limitation. See *State of California ex rel. Younger v. TRPA,* 516 F.2d 215 (9th Cir. 1975), cert. den. 423 U.S. 868; *League to Save Lake Tahoe v. TRPA,* 563 P.2d 582 (Nevada 1977); *League to Save Lake Tahoe v. TRPA,* 507 F.2d 517 (9th Cir. 1974); *League to Save Lake Tahoe v. TRPA,* 558 F.2d 914 (9th Cir. 1971).[7]

[7]The District Court held that the within action was also barred on the grounds of *res judicata* based on these decisions. It was not necessary for the Ninth Circuit to reach this issue.

Petitioners' assertion that the cases of *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) and *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977) are applicable is also without merit. The within action is clearly not a Federal action enforcing Federal claims for equitable relief or seeking vindication of public rights.

In the present case, the Federal Court sits in the unique posture of preventing an impairment to the effective functioning of the Compact. That is the sole basis of Federal Court jurisdiction in matters relating to the TRPA ordinances. *League to Save Lake Tahoe v. BJK Corp.*, 547 F.2d 1072 (9th Cir. 1976). The Federal nature of the within action is tenuous at best. Merely because Congress approved the TRPA Compact as negotiated and drafted by the States of Nevada and California should not be sufficient to conclude that Congress intended that relevant and applicable state statutes of limitation do not apply to actions relating to judicial review of administrative action taken by political subdivisions of the respective States. The United States Congress had no hand in the drafting of any of the TRPA ordinances. No determination of Congressional intent can be obtained from the TRPA ordinances. Thus, the reasoning of the *Holmberg* and *Occidental Life* cases have no applicability to the present case.

The Ninth Circuit's ruling does not have far reaching Federal significance. Merely because NRS 278.027 applies to the administrative decision of Douglas County under the TRPA Compact and ordinances does not mean that state statutes of limitation are applicable in every circumstance under all other bi-state compacts. Each multi-state agreement is unique and must be governed by the

specific language of the particular compact or charter in question.

It is therefore respectfully submitted that the application of NRS 278.027 in the present case is not an important question of Federal law and that the Ninth Circuit did not err.

IV

THE COURT OF APPEALS CORRECTLY HELD THAT WHERE AN ALLEGED INTERSTATE NUISANCE IS ANTICIPATORY AND THE PROJECTS COMPLAINED OF WERE APPROVED UNDER AN INTERSTATE COMPACT ESTABLISHING ENVIRONMENTAL CONTROLS GOVERNING SAID PROJECTS, THE COMPLAINING STATE'S FEDERAL COMMON LAW NUISANCE CLAIM MAY BE DISMISSED ON THE PLEADING.

Neither the Compact nor the Land Use Ordinance was intended to be a no-development, no-growth measure. The Compact was enacted to establish an "area-wide planning agency to adopt and enforce a regional plan of resource conservation and *orderly development.*" Compact, Article I(c). Implicit in the Compact and its ordinances is a belief and an expectation of the States of Nevada and California that there would be additional people, both permanent and transient, and accompanying additional traffic, in the Tahoe Basin. Lake Tahoe is indeed a national treasure, and both Nevada and California recognized its continuing magnetic attraction for all types of people from both states, the entire nation and indeed the world. The principal concern of the Compact was and is to recognize that reality, and

to establish a "broad and comprehensive scheme and plan" for effective environmental controls in the Basin. A complex and demanding approval process requiring intense interaction between Counties, the States and the governing Agency was therefore established. The very heart of the approval process is a concern for the protection of each State and all citizens against unnecessary degradation of the air, water and resources of the area.

Each project complained of by the Petitioners went through the intricate "gauntlet of approval established by the Compact and the ordinance." (App. A., p. 24). Belatedly, to say the least, the Petitioners asserted that the hotels and parking structures in question "indirectly will create a nuisance . . . that they will attract more people and cars to the Basin and that inevitably a nuisance will result." (App. A., p. 24). The District Court did not agree, nor did the Ninth Circuit.[8]

Petitioners cannot cite to this Court a single case where a State has been allowed to bring a Federal common law nuisance action when, as in the present case, the alleged nuisance is wholly anticipatory, wholly speculative and wholly indirect and, moreover, where the complaining State is a party to an Interstate Compact establishing a scheme of controls concerning the very environmental results complained of.

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[8]Petitioners have not even included copies of their respective Complaints in the Petition to this Court. In this respect, the Petition fails to afford the Court an adequate record upon which to assess the correctness of the Ruling of the District Court and the Ninth Circuit that the interstate nuisance claim does not state a claim for which relief can be granted.

In a setting such as the present one, involving as it does the balance of delicate interstate interests in an instrument the product of massive legislative hearings in Nevada and California, the Courts should not invoke equitable jurisdiction on the basis of a conjectural, speculative and premature claim of nuisance. The proposed facilities may be built and so operated (and are intended to be so built and operated by these Respondents) as not to be or cause a nuisance, and thus, it cannot be said *that at all times and under any circumstances, they may constitute a nuisance. Ryan v. Pitkin Iron Corporation,* 444 F.2d 717 (1971). Whether a particular thing is or may become a nuisance is to be determined, not by an abstract consideration but by considering it in connection with the circumstances and the locality. *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365, 47 S.Ct. 114 at 118 (1926).

The Ninth Circuit and the District Court correctly and appropriately weighed the claim of alleged interstate nuisance against the backdrop of "circumstances and locality." Indeed, the operation of the Compact has great influence upon the factors that should be weighed in applying Federal Common law nuisance doctrines and principles. (App. A., at p. 22).

The location is Lake Tahoe. The predominant circumstance is that two sovereign states have entered into an agreement, elevated to the status of Federal law, requiring that new construction projects may proceed only after an exhaustive environmental approval process. If approved, this "orderly development" has been acquiesced in by both parties as a reality of the Basin to be accomplished at such mutually acceptable "injury levels" as are occasioned by

any construction project. The projects in question are in compliance with the goals, standards and requirements of that agreement of the States. There is no credible evidence in the record or elsewhere to support the proposition that they will create an "interstate nuisance." Indeed, if there were such evidence, whether preponderant or clear and convincing, then the holder of every single approved construction permit in the Basin, of whatsoever type or nature, is also an inseparable and integral part of the interstate nuisance threat and should have been joined in this action to be enjoined from construction activity. Hotel-casino developments obviously do not pre-empt the broad scope of construction activity in the Basin, nor are they the sole actors upon the potential, speculative nuisance stage. These observations are common sense, and were obviously in the mind of the Ninth Circuit in its "locality and circumstances" considerations.

Nor does the result in *Illinois v. City of Milwaukee,* ..... F.2d ..... (No. 77-2246, April 26, 1979) (App. H) dictate otherwise. That case is clearly distinguishable. The facts there presented revealed a clear, existing, direct and continuing interstate nuisance having serious and immediate impact upon the health of human beings. In the *Illinois* case, Judge Tone stated,

> "The District Court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents carry the pathogens into Illinois waters, where that may infect drinking water supplies and pose a danger to swimmers, and therefore that the defendants' actions pose a significant risk of injury to Illinois residents." (App. H at p. 301)

The court referred to evidence supporting these findings which included the fact that the sewer system defendants operated had approximately 239 bypass or overflow points from which untreated sewage escapes to flow directly or indirectly into Lake Michigan or into rivers that empty into the Lake. In a single month in 1976, the untreated sewage discharged from just 11 of the 239 overflow points totalled 646.46 million gallons!

In the *Illinois* case, there was no allegation of "indirect pollution" that "might be caused" by more people and automobiles coming into a resort area. In the instant case, the Petitioners do not seek to stop an *existing* activity on the part of Respondents constituting a nuisance extending across state boundaries. Instead, they sought to enjoin a *threatened* or *apprehended* nuisance. Furthermore, in the *Illinois* case, there was no Interstate Compact in existence, addressing itself to the identical matters complained of, which required consideration in weighing the nature of the prospective harm. There is, indeed, a clear distinction between "high-rise hotels and their occupants" clearly contemplated under an interstate agreement and unconsented, unwarranted and inherently dangerous untreated sewage, noxious gases and poisoned pesticides. (App. A., p. 26).

Petitioners could not and cannot present in this case facts which warrant the application of Federal common law nuisance doctrines. Such facts and allegations as they assert are, to a great degree, identical to and the sum and substance of the approval process environmental considerations. Such injury to the environment as they posit is of the type and degree allowed under the Compact as

an expectable, realistic result of "orderly development." To ask of this Court or the Ninth Circuit to rule otherwise under these circumstances and to invoke Federal common law nuisance doctrines is to countenance selective action against a single element of a class (*i.e.* hotel-casino projects); is to allow a forum for "crystal-ball gazing" as to what the future may or may not portend in the Tahoe Basin; and more importantly, is to render the good-faith agreement of two sovereign states a nullity by allowing on the request of one State a judicial "re-write" of a Compact which has and should continue to have the highest degree of sanctity of contract, to be amended only by the consent of the parties and Congress.

The Respondents therefore submit that the Ninth Circuit correctly ruled upon the Federal interstate nuisance allegation and claim. The present facts and the foreseeable facts do not yield even the minimal "appropriate situation" in which such an action may be maintained.

CONCLUSION

This case is another in a continuing series of harassing litigation brought by Petitioners against Respondents over the last five years. It lacks merit; it does not involve an important question of Federal law; it does not conflict with a decision of another Court of Appeals. This is not an appropriate case for this Court to exercise its discretionary review authority. It is therefore respectfully submitted that the Petition For Writ of Certiorari be denied.

Dated, 3 August 1979.

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